As pointed out above, it is not at all clear whether the defendant had been paid Mary's lobola and this should have been elucidated. This Court is left in the dark as to what the relationship of the various parties is. If it had been a donation, or if plaintiff was entitled to the lobola and he donated this to his alleged son, then of course he could not sue for the return of the donation.

The evidence has been so abbreviated as to be almost unintelligible. Plaintiff states: " I handed the money over to the defendant."—" What money ? "—He refers again to " that money ", but this time appears to refer to the second lobola, whereas in the summons he claims the first lobola. He states that he assumed defendant influenced Mary, but adduced no proof in support thereof.

In recording evidence, the Native Commissioner must not record: " Plaintiff s.s.", but must give the full names of the plaintiff, followed by the words:—

" I am the plaintiff in this case ",

and then the relationship to other parties should also be set out.

This Court has no option but to allow the appeal with costs, and to alter the Native Commissioner's judgment to read:—

" Absolution from the instance with costs "

and the plaintiff can then bring an action on a summons drawn up in a more intelligible manner.

For Appellant: Adv. Jepson instructed by M. Goldberg, Esq., Pretoria.

For Respondent: Mrs. Bresler of Pretoria.

19 JAN 1956

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

VOLUME I
Part V

34(68)
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CASE No. 18 OF 1949.

TOM BUTELEZI (Appellant) *v.* MAVELA BUTELEZI (Respondent).

(N.A.C. Case No. 26/1/49.)

VRYHEID: Monday, 27th June, 1949. Before Israel, Acting President, Terblanche and Phipson, Members of the Court (North-Eastern Division).

Native Custom: Heirship—Affiliation—Requisites.

Held: Native Law is jealous of the rights of heirship, and as no non-member of an otherwise heirless house can be introduced capriciously into that house as its heir in disturbance of such rights except by operation of the customs referred to, a heavy onus rests on the plaintiff to prove such exceptions.

Appeal from the Court of the Native Commissioner, Louwsburg.

Israel, Acting President (delivering the judgment of the Court):—

The late Xosha Butelezi, father of both parties, took to himself during his lifetime six wives by customary union, but for the purposes of this case it is necessary to refer to only three of the houses thus established, namely, the first in which defendant (now appellant) is the eldest son; the third in which a woman Pokwe is the only child, and the fourth in which plaintiff (now respondent) is the only son.

In the Chief's Court plaintiff sought to recover from the defendant the lobolo which he (defendant) received in respect of the woman Pokwe, and based his claim on the allegation that the late Xosha had during his lifetime placed him (plaintiff) in the house of the third wife with the object of his eventually assuming the guardianship of that house which was then heirless.

It is common cause that defendant being the heir of the first house was *ipso facto* general heir of the late Xosha's kraal and the Chief found that as such, defendant was entitled to the lobolo of Pokwe in whose house there was no male heir.

This decision was reversed by the Native Commissioner on appeal, and defendant now appeals to this Court on general grounds, having been unrepresented in the Court *a quo*.

It is trite Native Custom that defendant as general heir to his late father's estate would ordinarily become entitled to the lobolo of all his half-sisters in whose houses there were no male heirs, and it is equally good Native Law that the eldest son of the first wife's house could be dispossessed of these rights only if there had been—

(*a*) disinheritance; or

(*b*) affiliation with or without subdivision of the kraal into sections.

The question of disinheritance does not enter into this case and need not be considered. No formal announcement or declaration by Xosha in terms of Sections 99 and 100 of the Code as to the status of his various wives at the time of the establishment of their respective houses has been proved or even mentioned in evidence, so that the question of subdivision also falls away. It then remains to be considered whether legal affiliation having the effect of giving plaintiff the property rights in Pokwe could be interpreted into the alleged placing of the plaintiff, who is the heir of the fourth hut, in the heirless hut of the third wife. Here again evidence of any formal declaration is entirely lacking and we have only the evidence of the plaintiff and of two women —one being the third wife—that the former was placed in the latter's hut when still a child, as eventual guardian thereof. Plaintiff himself makes no other pretension than that of guardianship, for he admits: "My father said nothing about cattle in his estate," and "None were given to me." But the women go a little further and one of them says: "My husband said that

plaintiff had to be the guardian of the child Pokwe and the heir to my house." Defendant disputes both versions and states that plaintiff was placed in Pokwe's mother's house merely as a shepherd.

This is all we have to go on, and even if plaintiff's story is accepted, or whatever might have been the object of this disposition of the parties' father, it is far from probative of the existence of any form of affiliation in the kraal in question.

Native Law is jealous of the rights of heirship, and as no non-member of an otherwise heirless house can be introduced capriciously into that house as its heir in disturbance of such rights except by operation of the customs referred to, a heavy onus rests on plaintiff to prove such exceptions. He has failed to discharge this onus and consequently cannot succeed.

The appeal is therefore allowed with costs, and the Native Commissioner's judgment is altered to read:—

"Appeal is dismissed with costs and the Chief's judgment is upheld."

For Appellant: Mr. A. G. Turton, of Messrs. Guy, Turton & Hannah, Vryheid.

For Respondent: Mr. H. L. Myburgh, of Messrs. Bennett & Myburgh, Vryheid.

CASE No. 19 OF 1949.

MQINISENI MBATA (Appellant) *v.* SIMEON ZULU AND ANOTHER (Respondents).

(N.A.C. Case No. 28/2/49.)

VRYHEID: Monday, 27th June, 1949. Before Israel, Acting President, Terblanche and Phipson, Members of the Court (North-Eastern Division).

Seduction: Proof of.

Held: That the seducer must bring evidence to contradict the seduced's evidence if he wishes to escape liability.

Appeal from the Court of the Native Commissioner, Nongoma. Terblanche, Member of Court (delivering the judgment of the Court):—

The appellant instituted an action for damages against the respondents on the grounds that No. 1 respondent was responsible for the seduction of his daughter, Alida Mbata, who gave birth to a male child in March, 1948.

The case came before an Assistant Native Commissioner who found for the respondents. In his reasons for judgment he appears to have been in doubt as to what actually took place, and based his judgment, after reviewing the evidence, mainly on the fact that Alida made no report to her parents about her condition.

It is common cause that she and No. 1 respondent were in love with each other for a number of years. In 1947 the lovers quarrelled and parted.

Now, the Court, after weighing the evidence of both sides very carefully, came to the conclusion that the version given by the girl Alida Mbata and her witnesses is probably the truth. She relates how, on many occasions, she and No. 1 respondent slept together in an "ilawu" hut at Sitole's kraal; that she became pregnant in July 1947; that they decided to hide the matter and run away to Durban where her lover would hide her.

Her evidence is supported by that of her sister, Sarafina Mbata, who is very emphatic that respondent No. 1 was at home in July, 1947, and that she saw the two lovers together at Sitole's kraal; that she administered to him at table the food her sister had cooked and that her sister's visit to Sitole's kraal lasted from the afternoon of one day to the morning of the next.

Alida's evidence is also supported by Agreneta Sitole whose evidence in chief appears to be a pack of lies. In cross-examination she comes out with the truth and says that Alida came to her to bid her farewell as she was about to escape with respondent No. 1 and that this took place in a hut in Alida's kraal, which on that particular day was visited by respondent No. 1. If a girl will take the trouble to go and bid her friend farewell and tell her that she and her lover are eloping, then it proves that the two are on very friendly terms and this being so the evidence of Agreneta Sitole to the effect that she knew nothing of meetings of the two lovers at her kraal cannot be believed.

On examining the evidence for the respondents, the Court finds that it stands bare and unsupported. Not a tittle of evidence has been brought by respondent No. 1, other than his own, to contradict the evidence for appellant. It would have been an easy matter for him to have called evidence to prove that he was absent from his home in Durban continuously from February to September, 1947, if this was the case. This would have proved for him that he was not responsible for Alida's pregnancy, as her child was born in March, 1948. Neither did he call any evidence to prove that he was not Alida's only lover.

The Court is of opinion that his evidence is not worthy of belief.

The appeal is allowed with costs and the judgment of the Assistant Native Commissioner altered to read:—

"For Plaintiff as prayed with costs."

For Appellant: Mr. H. L. Myburgh, of Messrs. Bennett & Myburgh, Vryheid.

For Respondent: Mr. W. E. White, of Messrs. Conradie & White, Vryheid.

CASE No. 20 OF 1949.

MGULI NKOSI (Appellant) *v.* CAIPHAS NGUBO (Respondent).

(N.A.C. Case No. 28/3/49.)

VRYHEID: Tuesday, 28th June, 1949. Before Israel, Acting President; Terblanche and Phipson, Members of the Court (North-Eastern Division).

Practice and Procedure—Citing of parties.

Children: Custody of—Christian-rite marriages.

Held: To cite the wife's father (who did not have the custody of the children, and who was not even her guardian at the time the action was instituted) as respondent; was totally irregular.

Held: In question of custody of children, the interests of the children are of paramount importance and the fitness of either party to have such custody must be established.

Held: Where former husband claims custody, the former wife must be cited as a party.

Appeal from the Court of the Native Commissioner, Nongoma.

Isreal, Acting President (delivering the judgment of the Court):—

This is a matter which has been brought before the Native Commissioner's Court by way of application. It appears that on the 4th July, 1947, the respondent was divorced by his wife, Ellen Ngubo (born Nkosi) in the Native Divorce Court. There were two minor children of the marriage—two and four years of age respectively, but as that Court has no jurisdiction to deal with the custody of its children, no order in that respect was made by it.

The woman Ellen Ngubo subsequently married again, and it is on record and was accepted by the Native Commissioner as true that she took the two children with her to her new husband.

In March, 1949, applicant (the divorced husband) then made application to the Court of the Native Commissioner citing his ex-wife's father as respondent, calling upon this man to deliver to his (applicant's) custody the two children of the former marriage.

The proceedings in the Native Commissioner's Court, although on application, seem to have taken the form of an action commenced by summons, and at the end of the hearing the Native Commissioner made the following order:—

> "Order as prayed, in which respondent is directed to release to the custody of applicant two female children, aged four years and two years respectively, born to applicant during the subsistence of his marriage with respondent's daughter, is granted with costs. Authority is granted for their removal from the custody of respondent or his daughter."

Respondent now appeals to this Court on the following grounds:—

(1) The defendant should not have been sued for the custody of the children claimed in this case.
(2) In any event no evidence was led to prove that the defendant had the custody of the children claimed when summons was issued.
(3) The judgment is generally gainst the weight of the evidence and the law.

In argument, Mr. du Toit, who appeared for appellant in this Court, elaborated on the first ground that defendant was not the person to have been sued, as the matter of custody is one between the parties to the former marriage and that in any event the respondent in the Native Commissioner's Court had not the physical custody of the children at the time.

It was also argued that in the proceedings in the Court *a quo,* guardianship as distinct from custody had been confused and that enquiry into the fitness of the parties and the interests of the children had not been instituted.

There have been decisions in this Court and very recent decisions in the Supreme Court that in questions of custody, the interests of the children are of paramount importance and that the fitness of either party to have such custody must be established.

There is no doubt in the mind of this Court as to the correctness of the contention that the former wife should have been a party to the proceedings instituted in the Native Commissioner's Court. She was not only not cited as a party, but she was not even given the opportunity of being heard in this matter which is of vital interest to her and to her children who are of tender years.

In these circumstances to cite her father (who did not have the custody of the children; and who was not even her guardian at the time the action was instituted) as respondent, was totally irregular, as no order of the nature asked for could possibly have been given against him.

The appeal therefore succeeds with costs. and the Native Commissioner's order is set aside with costs. The respondent in this Court should not be deprived of his right to institute proceedings against the proper person.

For Appellant: Mr. J. F. du Toit, of Messrs. Henwood & Co., Vryheid.

For Respondent: In default.

CASE No. 21 OF 1949.

NYANGANA NTULI AND OTHERS (Appellants) *v.* FRED MADONSELA (Respondent).

(N.A.C. CASE No. 32/1/49.)

PIETERMARITZBURG: 11th July, 1949. Before Steenkamp, President, Cowan and Schmidt, Members of the Court (North-Eastern Division).

Law of evidence—Production of books in certain transactions. Mercantile Law—Fraud—Misrepresentation.

Held: It is not fraud or misrepresentation where defendant could not have foreseen that a scheme for the investment of money would fail.

Held: Where evidence is given that the books do not show certain transactions, it would appear futile to produce such books.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp, President (delivering the judgment of the Court):—

In this case 65 plaintifls sued the defendant for various sums of maney amounting to (*a*) about £1,000, or (*b*) alternatively refund of deposits amounting to £114. 7s.

It is alleged in the summons that defendant is the promoter, operator and proprietor of a certain banking institution, and on deposit by the plaintiffs of the amounts set out, defendant promised, undertook and gave plaintiffs to understand that he would pay them, fourteen days as from date of deposit, an amount of £27 in respect of each pound deposited. Defendant has failed to pay the amounts promised after the expiration of the 14 days, and plaintiffs now claim the payment of the money, or alternatively they claim the refund of the amounts deposited. Defendant pleaded verbally and in that plea denied he promised plaintiffs that he would pay them £27 in respect of each £1 deposited after the expiration of 14 days.

On the day of the hearing of the case Counsel for plaintiffs abandoned the principal claim and stated his intention was to proceed to the alternative claim only, i.e., the claim for the refund of the money deposited. Defendant's Counsel thereupon tendered a further verbal plea denying liability to refund the amounts mentioned in the summons.

By consent of both parties it was agreed that the claim of plaintiff No. 22, Nyangana Ntuli, for £1. 2s. 6d., be proceeded with and that the claims of the other plaintiffs shall abide by the result of the claim of Nyangana Ntuli.

The Native Commissioner after hearing evidence entered an absolution judgment with costs, and against this judgment an appeal has been brought before this Court on the following grounds:—

(1) That the learned Assistant Native Commissioner erred in not finding for plaintiffs in view of the preponderance of evidence led by the plaintiffs.

(2) That the learned Assistant Native Commissioner erred in holding that the onus of proof of enrichment of the defendant was on the plaintiffs in view of the evidence led by the plaintiffs.

Plaintiffs' evidence is to the effect that during February and March, 1948, defendant told them he had received some money from America and that for each £1 deposited with him he would refund £27. In addition to the £1, he had to pay 2s. 6d. which defendant told them was for his own expenses for doing the work. It appears further from the evidence that when the money was deposited, defendant gave each depositor a slip of paper which plaintiff calls a receipt. It is convenient at this juncture to set out the contents of the slip of paper which was handed in by plaintiff as exhibit "A":—

"JOIN THE TEN SHILLINGS SNAPPY LINK.

THIS IS BETTER THAN THE FAMOUS SHILLING ROLAND LINK.

As soon as you receive this make out three copies and send them to three reliable friends. Send ten shillings postal order or ten shilling note registered to a person whose name appears as No. 1 on the Link.

Arrange names in the copies you have made, so that No. 2 becomes No. 1 and No. 3 becomes No. 2, and your name to take position 3.

N.B.—IF YOU CANNOT PURSUE THIS LINK PLEASE POST IT BACK TO A PERSON WHOSE NAME AND ADDRESS APPEARS LAST IN THE LINK.

RESULT.

WITHIN A WEEK YON CAN RECEIVE 3×3×3×3× £27 OR £13. 10s.

No.	*Name.*	*Address.*
1.	.....	.....
2.	.....	.....
3.	Charli Ntuli.....	.....

Particulars of Postal Order or Registered Slip.

Name of Addressee.....

Slip No.....H?.....

Date of Postal Order.....28/2/1948.....

N.B.—ALL MONEY MUST BE SENT BY POST AND NOT HAND TO HAND.

Fred Madonsela,
Edendale,
P.O. Esikoleni,
PIETERMARITZBURG."

Plaintiff further states that defendant showed them sacks which he stated contained the money he had received from America. Plaintiff admits that some of the Natives had received payment. This presumably means that Natives who had previously deposited money had received from the Defendant an amount of £27 for each £1 deposited. Now Defendant denies he had told the depositors that he had received money from America, and I doubt very much whether he said this, and the probabilities are that this testimony was an afterthought as according to evidence adduced on behalf of plaintiff, the people were already queueing up to deposit their money when defendant made the alleged statement. They must have induced themselves to do so after having learned that previous subscribers had received dividends. It is therefore obvious that plaintiff and the other people who formed the queue went there not to hear about the scheme, but to invest their money.

The slip of paper handed is as exhibit "A" must be accepted as being the basis of the contract between the parties and I therefore accept that the scheme initiated by the defendant is to the effect that when a person has deposited £1 he must obtain 27 more subscribers and after these 27 had deposited £1 each, the plaintiff was entitled to receive £27. The £1 deposited by plaintiff went towards the payment of £27 due to previous depositors. The plaintiff might not have realised that the longer such a scheme is conducted, the more difficult it would become to raise subscribers and eventually saturation-point will be reached when people are no longer prepared to subscribe. There is nothing to show that defendant did not foresee this and therefore it cannot be said that he has deliberately made misrepresentations. The only conclusion I can come to is that the plaintiff invested in a scheme embarked upon by defendant and which must eventually be doomed. There was certainly an onus on the defendant to show that the £1 he had received from the plaintiff was used by him to pay out prior subscribers. In his evidence he states: "The pounds I collected were used to pay out people who had paid me first" and "I have paid out all the pounds I collected. The half-a-crowns I kept for myself." It is true he did not produce his books but at no time was he called upon to do so. In fact he states, on being questioned by the Court, that his books would not show whether he paid the clerks out of the £1 or out of the 2s. 6d., but he does state that he kept the pounds separate altogether from the half-a-crowns and after he had paid his clerks, he paid himself whatever was left out of the half-a-crowns. We therefore have the evidence by the Defendant that he had paid

out the money which he accepted under certain conditions, and plaintiff has not been able to rebut that evidence. In view of the evidence given by defendant that his books will be of no assistance, it does seem that their production would have been futile.

The scheme, if closely examined, can mean no more than a project for the circulation of money through the "Banker" and as there is evidence that some people had benefited considerably by subscribing to the "Pool", can it be said that the whole object was a fraud? It broke down for the reason that saturation-point was reached and neither the defendant nor the plaintiff realised that this must occur sooner or later. Defendant made money out of the business to the extent of £2 or £3 a week as admitted by him, but that was for his trouble and work and was made out of the half-a-crowns paid in addition to the £1 required to be deposited. He was enriched out of that, but it was not unjustified enrichment as he rendered services for the 2s. 6d. In fact, plaintiff states he is not claiming the 2s. 6d. as that was deposited for defendant's services.

This case is unique in the annals of South African law but it seems common knowledge that the scheme is based on what is commonly known as the "chain letter" system of which many have circulated in South Africa, having its origin, I believe, in America. A scheme of this nature, when it falls in the hands of unenlightened people, must have repercussions leading to bitter disappointments, but in the absence of legislative sanctions, it is feared losses will have to be borne and written down to the credit side of experience gained.

This Court takes the view that defendant has discharged the onus that he has not been enriched at the expense of the plaintiff. Prior subscribers might have been so enriched, but not to the extent that it may be classified as unjustified enrichment.

The Court below would have been justified in entering judgment for defendant and this would probably have been done if the Native Commissioner had not misdirected himself on the question of onus.

There is no cross-appeal and this Court will therefore not interfere with the judgment. The appeal is dismissed with costs.

For Appellant: Adv. J. R. M. Swain, instructed by Messrs. McGillewie & Co., Pietermaritzburg.

For Respondent: Adv. J. H. Niehaus, instructed by Messrs. Nathan & Co., Pietermaritzburg.

CASE No. 22 OF 1949.

JOSEPH GAMBU (Appellant) *v.* LOTTIE RADEBE (Respondent).

(N.A.C. CASE No. 2/1/49.)

PIETERMARITZBURG: 11th July, 1949. Before Steenkamp, President, Hobson and Schmidt, Members of the Court (North-Eastern Division).

Practice and Procedure—Judgments—Delivery of.

Held: That a judgment is part of the proceedings, and, subject to certain exceptions mentioned therein (in terms of rule 1 of Government Notice No. 2254 of 1928, which lays down that the proceedings of a Native Commissioner's Court must be conducted in open Court), such judgment must be delivered in open Court.

Appeal from the Court of the Native Commissioner, Bergville.

Steenkamp, President (delivering the judgment of the Court):—

The Native Commissioner who tried the case reserved judgment and in the meantime he was transferred from Bergville to Port Elizabeth. While at the latter place he prepared a written judg-

ment and transmitted this to his successor at his previous station. Instead of the judgment being delivered in open Court it has been ascertained by the Registrar of this Court that the representatives of the respected parties were posted a copy of the judgment. The judgment is dated the 12th February, 1949, but it is not at all clear when the respective parties received this judgment. An appeal dated the 18th March, 1949, was lodged with the Clerk of the Court but Counsel for Appellant has informed this Court that at the time the appeal was noted, appellant's Attorney had not received the written judgment. He had been notified by the Clerk of the Court telephonically that the judgment was in favour of defendant.

According to rule 1 of the Native Commissioners' Court Rules, the proceedings in a Native Commissioner's Court shall be conducted in open Court subject to certain exceptions, which do not apply in this case. A judgment is part of the proceedings and this Court cannot understand why a judicial officer could not have read out in open Court the judgment prepared by the Native Commissioner who was no longer available at that station.

Counsel for appellant has urged that until judgment is delivered in open Court, there is no judgment and the parties could have ignored any other form of judgment. This Court agrees with that view, but it would have been dangerous for either party to have treated with impunity the judgment, as they could not have known what attitude a Court of Law would take up at a later stage.

The position is that no judgment has been properly delivered and the record will have to be returned for this purpose. The unsuccessful party may thereafter appeal and the grounds of appeal should be transmitted to the Presiding Officer for any additional reasons of judgment he might choose to give.

The appellant could have made application to the Court below indicating the irregular procedure which had been followed and applying for a judgment in accordance with practice to be delivered. Instead of this he lodged an appeal without grounds and then applied to this Court for condonation of late noting. This could all have been obviated. If an appeal with grounds, giving as one of the reasons that the judgment had not been delivered in open Court, had been lodged, the respondent might have, in order to save further costs, abandoned the judgment, as provided for in rule 7 (1) of the Native Appeal Court Rules, and agreeing to a fresh judgment being delivered in open Court.

It seems only right that appellant should bear the costs of the hearing at this Session, and it is accordingly ordered as follows:—

> "It is ordered that the record be returned to the Native Commissioner's Court for the delivey in open Court of the written judgment prepared by the Presiding Officer. Any other judicial officer with jurisdiction may deliver the judgment but a note must be made on the record that the judgment is delivered, and the date thereof. Appellant to pay costs."

RIDER.

Both Counsel have requested that this Court should indicate to the Native Commissioner that he should, in his reasons, deal with every paragraph of the plea and give a finding thereon, but it is not the function of this Court to give such a direction at this stage, although it might be advisable, if the case comes before this Court again, to have the benefit of the trial Court's opinion on all aspects of this particular case.

For Appellant: Adv. N. James, instructed by Messrs. Macaulay & Riddell, Ladysmith.

For Respondent: Mr. R. W. Anderson, instructed by Mr. V. M. C. Beck, Ladysmith.

Statutes, Proclamations, etc., referred to:—
Government Notice No. 2253, 1928, Section 1.
Government Notice No. 2254, 1928, Section 7 (1).

CASE No. 23 OF 1949.

MKOHLISWA CIYA (Appellant) *v.* AARON DHLAMINI (Respondent).

(N.A.C. CASE No. 15/3/49.)

PIETERMARITZBURG: 11th July, 1949. Before Steenkamp, President, Hobson and Schmidt, Members of the Court (North-Eastern Division).

Native Law and Custom—Allocation of gils as security for debts —Lobola—Dilivered before marriage—Sisa—Mvimba.

Held: That allocation must be made in the recognised public manner in the presence of the elders and kraal inmates, particularly the heir concerned.

Held: That cattle delivered before celebration of customary union are sisa cattle.

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp, President (delivering the judgment of the Court):—

In his claim before the Chief, the plaintiff (respondent in this Court) asserts that his late brother, Shuqu, paid to defendant's father, Jequ, nine head of cattle and £10 being lobolo payable for defendant's half-sister, Nonkosanana, and in his evidence he avers that he is entitled to be refunded five head of cattle and £10.

The Chief gave judgment for defendant with costs, but on appeal to the Native Commissioner this judgment was altered to read: "For plaintiff for four head of cattle and £8. 12s. 6d. with costs."

An appeal has now been noted to this Court on the following grounds:—

(1) The judgment is against the weight of evidence.

(2) The learned judicial officer erred in holding that there was an onus on defendant to explain after a lapse of a very long period of time (20 to 25 years) the alleged sale at Shuqu's kraal.

(3) The learned judicial officer failed to give sufficient weight to—
   (*a*) the fact that the alleged making over of the girl was not carried out according to custom;
   (*b*) that prepayment of all lobolo is not in accordance with custom nor probable; and
   (*c*) that plaintiff neglected for a very long time to bring his claim or notify defendant of his alleged rights.

(4) That the judgment is bad in law in that some of the cattle would be sisa cattle if plaintiff's allegations are correct and others would have been paid as mvimba cattle, the ownership vesting in defendant's father, and plaintiff has failed to prove that the alleged sisa cattle are alive and subject to return, there being a strong presumption that after a lapse of such a long period the cattle would be dead.

It is common cause that the woman Nonkosanana lived with Shuqu for a number of years and bore him four children, and it is not disputed that no marriage ceremony ever took place. If it is correct that nine head of cattle and £10 were paid, then the cattle would have been looked upon as sisa cattle until the marriage was celebrated. Defendant, however, states that his late father only received four head of cattle, being the mvimba beasts payable for four pregnancies at the rate of one beast per pregnancy.

The events that led up to the present case occurred more than twenty years ago, as the youngest child, named Ntombinjane, is already of marriageable age. At this stage it is convenient to remark that it seems rather strange that the return of the sisa cattle was not claimed after Shuqu's death which occurred when Ntombinjane was about two years old.

From the evidence it appears that after Shuqu's death the woman Nonkosanana was married to a man by the name of Joni Mbele, with whom she is still living.

The illigitimate child, Ntombinjane, was taken to the kraal of Joni, where she grew up. There was never any dispute between these parties that the property rights in this child belonged to defendant's father, Jequ, and after Jequ's death, to the defendant, who was the heir.

Jequ died about nine years ago and the plaintiff's reason for not having claimed the refund of the cattle paid to Jequ, is that Jequ informed them that the girl Ntombinjane was to be looked upon as the person out of whose dowry the refund would be made. In other words he claims that the girl was allocated to him and he who alleges an allocation must prove it [see Mngadi *v.* Mngadi, 1931 N.A.C. (T. & N.) 53]. In the case of Dhlamini *v.* Dhlamini, 1940 N.A.C. (T. & N.) 74, it was held that even if a father could make an allocation of a beast, it would have to be made in the recognised public manner in the presence of the elders and kraal inmates, particularly the heir concerned. Moreover it would appear necessary that the allocation of a daughter to a stranger should be made in a public manner. Plaintiff has not adduced any evidence that the allocation was so carried out. Defendant, on the other hand, states that if his farther had pointed out Ntombinjane he would have called men together and given her away in their presence.

It seems most extraordinary that the plaintiff should have waited so many years before asserting his claims for the refund of the sisa cattle, especially as he states in his evidence that some of those cattle that were paid as lobolo by his brother Shuqu were disposed of by the late Jequ.

It is much more lkely that plaintiff would have followed up his sisa cattle (if it is true that defendant's father owed such cattle) and claimed them from the possessor rather than wait on the lobolo of a girl who was then only about two years of age and who might not live until she attains marriageable age. This is where plaintiff's case is not convincing, especially as an allocation as averred by him was not made in a public manner. Defendant can only give evidence to the effect that his father never informed him that any cattle were refundable to plaintiff in his capacity as heir to the late Shuqu. Defendant states that as far as he knows, only four head of cattle were paid by the late Shuqu and these payments were in respect of mvimba cattle due to the late Jequ.

Plaintiff's allegations really amount to this, that as the defendant's father owed him five head of sisa cattle, the girl Ntombinjane was pledged with the understanding that when she becomes married, the refund would be made out of her lobolo. Counsel for respondent has argued that as the potential lobolo value of the girl was 10 head of cattle plus one beast Nqutu, he was quite prepared to wait until she is of marriageable age before asserting his claim. Plaintiff has, however, overlooked the fact that even if he is to be believed he could only have claimed five head of cattle and not the full lobolo. If the girl had been allotted to him, it does not mean that he, as allottee, becomes the owner of all the cattle paid for the girl, *vide* Xulu *v.* Langa, 1940 N.A.C. (T. & N.) 117, and Mahlabo *v.* Mahlabo, 1947 N.A.C. (T. & N.) 31.

It is true that Nonkosanana, the half-sister of defendant, gave evidence on behalf of the plaintiff, but the way this Court reads her evidence, it is quite probable that she is antagonistic towards the defendant. They have quarrelled over this girl Ntombinjane and there was a case in the Chief's Court in which Joni claimed the child. It is clear that this woman takes up the attitude that as she does not belong to the same house as the defendant, she has all the say over this girl. There is evidence that she and her late father had a quarrel. She wanted some clothes from her father and before she received these, the man Shuqu died. She states that five head of cattle were paid as lobolo by Joni

and these should have been paid over, but she cannot understand why her father did not do so. It is therefore clear that the late Jequ actually had cattle when Nonkosanana got married to Joni, and Shuqu's heir would have been too eager at that time to obtain a refund of the engagement cattle and would not have waited until all the cattle had been disposed of before asserting his claim for what, after all, was his own cattle sisaed to the woman's father.

Nonkosanana gave inconsistent evidence. First of all she states she was not engaged to Joni when discussions between plaintiff and her father took place about the girl Ntombinjane. Later she states she was already engaged and Joni had pointed out five head of cattle and that these five had been paid for defendant's lobolo and her father's lobolo apparently for a new wife. She goes on and states that she was already married to Joni when defendant's lobolo was paid. Here we have a case in which lobolo cattle were actually at the kraal of the woman's father and this Court cannot conceive that the cattle previously paid as engagement cattle by another man, were not immediately claimed by the heir to Jequ.

It appears as if Nonkosanana has instigated the plaintiff to claim the cattle. This Court does not overlook the fact that plaintiff's claim before the Chief was for nine head of cattle. He did not deduct any mvimba cattle and it was only when the case was heard by the Native Commissioner that his Attorney claimed five head of cattle and £10.

This looks very much as if Plaintiff, knowing that his late brother Shuqu and the woman Nonkosanana lived together for a number of years and had four children together, now wishes to claim the property rights in the girl Ntombinjane and to strengthen his claim he comes with the subterfuge that the girl had been allocated to him.

There is a heavy onus on the plaintiff to prove a debt due by a deceased person and in the opinion of this Court, the evidence he adduced is not conclusive that his late brother actually paid nine head of cattle and £10.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

> "Appeal from the Chief's Court is dismissed, but the Chief's judgment is altered to read: 'Absolution from the instance with costs'."

For Appellant: Mr. G. Clulow, of Ixopo.

For Respondent: Adv. J. D. Stalker, instructed by Mr. H. L. Bulcock, Ixopo.

Cases referred to:—

Mngadi *v.* Mngadi, 1931, N.A.C. (T. & N.) 53.

Dhlamini *v.* Dhlamini, 1940, N.A.C. (T. & N.) 74.

Xulu *v.* Langa, 1940, N.A.C. (T. & N.) 117.

Mahlabo *v.* Mahlabo, 1947, N.A.C. (T. & N.) 31.

CASE No. 24 OF 1949.

MNTUKAYISE ZUNGU (Appellant) *v.* **GULANZO ZUNGU (Respondent).**

(N.A.C. Case No. 20/1/49.)

ESHOWE: 19th July, 1949.—Before J. H. Steenkamp, President, Oftebro and Thompson, Members of the Court (North-Eastern Division).

Native Law and Custom—General heir—Disinherison of.

Law of Evidence—Degree of proof required in affiliation cases.

Held: That in cases of affiliation or substitution, conclusive evidence of a high degree must be brought before a son can be disinherited.

Appeal from the Court of the Native Commissioner, Empangeni.

Steenkamp, President (delivering the judgment of the Court):—

The late Mahlambulukana Zungu had nine wives. It is only necessary for the purpose of this case to refer to the first four wives.

This is an appeal from the Court of the Native Commissioner at Empangeni. The parties are Zulus and the events that led up to this case all occurred during the time when the old Code of 1878 was in force in Zululand.

The first wife married by the late Mahlambulukana Zungu was called Qwabe, but she died leaving no issue whatsoever. At the time of her death the second wife was already married, but after the death of the first wife, Mahlambulukana Zungu married a woman by the name of Jabisa.

Plaintiff (respondent in this Court) is the eldest son and heir to the second house. Jabisa, who is still alive and must be a very old woman now, has had no children.

Defendant's mother, Nonkonyana, was the fourth wife. It is now alleged by the defendant (appellant in this Court) that after the death of the first wife, Qwabe, his father married Jabisa and placed her in the Indhlunkulu house for the purpose of raising an heir, but as she had no children, Nonkonyana, the fourth wife married, i.e. the defendant's mother, was affiliated to Jabisa.

Normally in the absence of an heir in an Indhlunkulu house, then the eldest son of the second wife married, become the general heir, i.e. in this case, the plaintiff.

The plaintiff sued the defendant for the delivery of ten head of cattle being property belonging to the Estate of the late Mahlambulukana Zungu.

The Native Commissioner, after having placed the onus on the defendant to prove that an affiliation as alleged by him took place, found that he had not discharged that onus and at the conclusion of defendant's case, without plaintiff adducing any evidence, gave judgment in favour of plaintiff as prayed with costs.

Defendant in his evidence first states that plaintiff was at the funeral of the late Mahlambulukana Zungu. Later on he states that plaintiff was not there. He further states that he remembers when his father divided the kraal into sections and he also states that when his father died, he held the spear to stab the grave-site, after a discussion took place at the grave-site as to who was the person to do this.

Taking defendant's evidence as it stands, it would appear as if his father did not divide his various kraals until after the defendant was born. The brother of the deceased, Pesheya Zungu, a Chief, also gave evidence on behalf of the defendant, and he states that the third wife married was never affiliated to the Indhlunkulu house, and that if the fourth wife had been affiliated as alleged by the plaintiff, he would have expected to have heard about it. This witness goes on and states that his late brother did not call a meeting of the family. He only mentioned to the inmates of his kraal that the defendant was to be his heir, and that his brother died before he confirmed the appointment of an heir.

Another witness called by the defendant states that defendant's mother was affiliated to the third wife after the marriage of the fourth wife, i.e. defendant's mother. He said it was soon after marriage—about two days, but the evidence of this witness was somewhat destroyed when, under cross-examination, he states: "The meeting may have been a year after the deceased married the fourth wife." He talks of two meetings and states that the second meeting was necessary to verify the statement previously made.

An important witness of the defendant is Jabisa, the third wife. She states that her hut was the Indhlunkulu and that the fourth wife, i.e., defendant's mother, belongs to her hut. It should

be noted that she does not state she was affiliated to the Indhlunkulu but rather does she aver that she was the substituted wife of that kraal. She gives the reason for this that the fourth wife was put into her hut the day after the marriage and that she, Jabisa, had previously been placed in the Indhlunkulu hut. She goes on and states that her late husband died before he divided the Ikohlo kraal into sections.

The fifth witness called by the defendant, namely Andreas Mlotshwa states he was a neighbour of defendant's father and he tells the Court that the first time a declaration of affiliation was ever made was after the deceased had married all his 9 wives.

It is on all this inconsistent and conflicting evidence that the Native Commissioner had to decide whether an affiliation had taken place. The Native Commissioner in his reasons for judgment states that as the onus was on the defendant and he had failed to discharge that onus, he gave judgment for plaintiff. He also found proved that no declaration of status was made at the time of the customary union with the fourth wife and that the kraal head never divided his kraal into sections.

An appeal had been noted to this Court on the following grounds:—

(i) That the evidence clearly proved that appellant's mother was affiliated to the Indhlunkulu section of the kraal, thus establishing the appellant as general heir.

(2) That the learned Native Commissioner erred in declaring respondent to be the general heir in as much as the respondent being the eldest son of the second wife becomes the Ikohlo heir (*vide* Section 99 of Proclamation 168, 1932).

At the outset it should be mentioned that the present Code cannot be considered in deciding this matter, as all the events took place, as mentioned before, when the Code of 1878 was in force in Zululand.

All the authorities consulted are definite that when there is no issue in the Indhlunkulu house or in its affiliated houses, then the eldest son in the Ikohlo house becomes the general heir.

In the case of Mzimela *v.* Mzimela, 1940, N.A.C. (T. & N.) 1, the question was also raised as to who the general heir is when the first wife had no male issue. In that case the defendant alleged that the fourth wife was affiliated to the first wife on her marriage. It is not clear in that case whether the first wife was dead when the fourth wife was married, but one point is clear, and that is that the first wife had no male issue. The Native Appeal Court held that evidence of affiliation was not conclusive and no proof of any declaration of status having been made at the weddings, the eldest son of the second wife could not be disinherited.

In the present case it is also sought to disinherit the eldest son of the second wife, and that high degree of proof required, is lacking.

We do not overlook the fact that according to Section 28 of the Code of 1878, when the Great Wife dies in the husband's lifetime without leaving any male issue surviving her, the husband regulates the future position of the houses as he sees fit, but conclusive evidence—which is lacking—is necessary to substantiate this.

The appeal is dismissed with costs.

For Appellant: Adv. G. D. E. Davidson, of Empangeni.

For Respondent: Mr. S. H. Brien, of Eshowe.

Statutes, Proclamations, etc., referred to:—

Section 28, Code of Native Law (Natal), 1878.

Section 99 of Proclamation 168 of 1932.

Cases referred to:—

Mzimela *v.* Mzimela, 1940, N.A.C. (T. & N.), 1.

CASE No. 25 OF 1949.

PAMBANISO NZUZA (Appellant) *v.* MATSHANA NGEMA (Respondent).

(N.A.C. Case No. 23/2/49.)

ESHOWE: 19th July, 1949. Before Steenkamp, President: Oftebro and Thompson, Members of the Court (North-Eastern Division).

Law of Evidence.—Natal—Contents of marriage register.

Held: That the marriage register prescribed by Section 70 of Natal Code of Native Law is a prescribed document and the contents thereof must be presumed to be correct.

Appeal from the Court of the Native Commissioner, Mtunzini.

Steenkamp, President (delivering the judgment of the Court:—

Plaintiff (respondent in this Court) sued the defendant (appellant) in the Native Commissioner's Court for ten head of cattle and costs, and in his summons he alleges that he advanced this number of cattle to the defendant for lobolo purposes.

In his plea appellant denied liability and the Native Commissioner gave judgment in favour of respondent for six head of cattle with costs, and against this judgment an appeal has been noted to this Court on the following grounds:—

(1) That the onus of proving that the cattle were loaned to defendant rested on the plaintiff and he failed to discharge such onus.
(2) That the Native Commissioner placed insufficient reliance upon the entries of the marriage register.
(3) That the judgment is against the weight of evidence.

From the record it appears that the defendant is the illegitimate son of plaintiff's wife, and was born before he married her. After plaintiff married his wife, the defendant remained behind—either with his wife's people, or with defendant's natural father. Defendant eventually took up residence with his mother and he states he did this on the invitation of the plaintiff and his mother, who were very kind to him.

Respondent avers that when appellant got married he paid nine head of cattle on behalf of appellant's lobolo, on the understanding that appellant remained with them and that the lobolo for his eldest daughter would be used to refund the lobolo advanced by the respondent.

Appellant got married in 1946 and it is therefore obvious that he can have no daughter of marriageable age as yet, but respondent bases his claim on the fact that appellant has now left him and he is therefore entitled to claim the refund of the lobolo at once.

Appellant in his evidence avers that the lobolo cattle he used were his own earnings and that when he took up residence with the respondent he actually took with him some cattle, and he gives as one of the reasons why he took up residence with the respondent as the fact that respondent mentioned the district of Mtunzini was much more suited for cattle. He states that while living with respondent he purchased more cattle from various people.

Counsel for respondent has also urged that as the cattle were in possession of the respondent (plaintiff) when they were paid out as lobolo, the onus is on appallant to prove that he was the owner of the cattle. This argument might be sound in different circumstances, but it cannot be overlooked that respondent parted with possession and therefore the burden of proof is on him that he had advanced the cattle to the appellant for the payment of lobolo. The respondent has not satisfied us, in view of conflicting evidence given by him and his witnesses, that the cattle paid out as lobolo were in fact his property.

Respondent brought several witnesses in an attempt to prove that he had actually advanced the lobolo cattle for the appellant. On the other hand, appellant is supported by the marriage

register, which was handed in by consent, and in which it is stated that the source from which the lobolo obtained was appellant's own earnings. It is sought to attack this entry as not being correct. Respondent called the official witness, who is a relative. This witness states that respondent actually showed him the eight head of cattle which he was advancing as lobolo. The relationship of the official witness Ephraim to the respondent is that of an uncle. Ephraim further states that the appellant was recorded in the marriage register as a child of respondent, but on reference to the marriage register it is found that his father's name is given as Mahlalotini, and according to the evidence of the respondent himself, this was appellant's natural father. The witness Ephraim is therefore not correct in stating that respondent was recorded as being the father of the appellant.

The Native Commissioner in his reasons, states that he attached no importance to the marriage register for the reason that respondent was not present when the document was completed, and further it is not a document which was sworn to. It is not clear why the Native Commissioner mentions that as the marriage registration is not under oath, he attaches no importance thereto. Nowhere in the Code is it prescribed that the contents in a registration should be under oath. He treated this as secondary evidence and attached no evidential value to it. It is difficult to understand why the Native Commissioner attaches no value to evidence based on a document which is prescribed by Section 70 of the Natal Code. He also states that the marks to the marriage register were not witnessed. The appellant cannot be blamed for this and if there is any blame, then this must be attached to the Native Commissioner who registered the marriage in his office. This marriage register is a prescribed document and the contents thereof must be presumed to be correct.

It is true that in the case of Qwabe *v.* Qwabe, 1945 N.A.C. (T. & N.) 101 at page 103, the Court was not prepared to accept the registration as irrebuttable evidence, but in the case of Sangweni *v.* Sangweni, 1945 N.A.C. (T. & N.) 103, where also the registration of a marriage was in dispute, the court held that the rule *omnia praesumuntur rite esse acta* is applicable und unless and until the record of that registration is impugned by strong evidence, the Court is bound to act on that evidence.

Counsel for respondent has advanced the argument that the respondent was not a party to the registration of the marriage and therefore could not be bound thereby.

This Court concedes that the document cannot bind the respondent, as he was not a party thereto, but it gives a fair indication of the facts as they existed at he time and as reported to the official witness.. Respondent must stand or fall by the evidence of the official witness who gave evidence on his behalf, and whose duty it was to have the true facts registered.

It is more likely that at the time of the registration of union, the correct information was recorded, as the parties were then not at enmity with each other. The official witness, Ephraim, can therefore not be believed when he states that no mention was made as to where the cattle came from.

On the evidence the Native Commissioner should have found that plaintiff has not proved conclusively that he had advanced the lobolo cattle for the defendant.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

"Absolution from the instance with costs."

For Appellant: Adv. G. D. E. Davidson, of Empangeni.

For Respondent: Mr. H. H. Kent, of Eshowe.

Statutes, Proclamations, etc., referred to:—

Section 70, Proclamation No. 168 of 1932.

Cases referred to:—

Qwabe *v.* Qwabe, 1945 N.A.C. (T. & N.) 101.

Sangweni v. Sangweni, 1945 N.A.C. (T. & N.) 103.

CASE No. 26 OF 1949.

FABAGIYA CEBEKULU (Appellant) *v.* JOTHAM XULU (Respondent).

(N.A.C. Case No. 20/2/49.)

ESHOWE: 19th July, 1949. Before Steenkamp, President, Oftebro and Thompson, Members of the Court (North-Eastern Division).

Native Law—Delivery by " word of mouth ".

Held: Delivery by " word of mouth " constitutes good delivery.

Appeal from the Court of the Native Commissioner, Empangeni.

Steenkamp, President (delivering the judgment of the Court):—

The defendant obtained a judgment in the Chief's Court against one Matewu Ndaba and thereupon the Chief's Messenger attached two head of cattle. It is not clear from the pleadings whether the two head of cattle so attached were found in the possession of Matewu Ndaba (who will hereafter be called the judgment debtor), but the Native Commissioner placed the onus on the defendant, who was the judgment creditor.

The plaintiff (claimant of the two cattle) sued the defendant for the release of the two cattle. The Chief granted judgment in his favour and on appeal to the Native Commissioner this judgment was sustained. An appeal has now been noted to this Court. The parties were unrepresented in the Court below and therefore grounds of appeal are not necessary.

Defendant's evidence is to the effect that Matewu Ndaba, the judgment debtor, owed him five head of cattle, being return of lobolo, and that the judgment debtor pointed out the five cattle amongst which was a grey cow in calf, and this cow is the one in dispute, and has since calved. Defendant, however, further in his evidence states: " He (judgment debtor) did not point out the cattle to me. He only described them to me."

Here it should be mentioned that defendant in his evidence states he afterwards saw the grey cow in plaintiff's possession and then had her attached. The onus was, therefore, quite correctly placed on the defendant.

The judgment debtor did not pay the grey cow and thereafter he was sued by the defendant who in evidence states that the judgment debtor wanted to hide the cow from him. Defendant called one witness who, however, states that he did not even know whether the judgment debtor had any cattle.

The case now boils down to a legal issue as to whether a description of cattle is sufficient to enable the Court to hold that there has been delivery—constructive or otherwise.

The Native Commissioner's reasons are rather sparse and do not assist this Court. All he states is—he held that as the cattle were not pointed out but only described, there was not constructive delivery, and held further that the cattle in question had never been delivered to the defendant.

Section 147 of the Code reads:—

(1) Delivery is given and taken at the place of the party who sells, barters *or is to deliver the property, unless a special stipulation to the contrary is made.*

(2) Constructive delivery is recognised under Native Law.

The following authorities have been consulted:—

Mbulawa *v.* Fokseni, 1920 (N.H.C.) 32.

Nyongwana *v.* Xolo, 1912 (2) (N.H.C.) 46, to ascertain what is meant by delivery by " word of month ".

In Nyongwana *v.* Xolo's case there was evidence that the buyer had not seen the beast he alleged he had purchased. His reply to the question was: " The beast has never been brought to me and I have never seen it to this day." It also transpires from that judgment that the buyer and seller were working at Johannesburg at the time the sale took place. It is clear the buyer never

saw the beast, yet the Native High Court held that plaintiff was entitled to succeed and judgment was granted in his favour. The conclusion arrived at was that the payment of the purchase price and the delivery of the animal by word of mouth to the purchaser constituted a good delivery under Native Law. Special leave to appeal to the Appellate Division was refused by the latter Court.

In Mbulawa's case the beast was actually pointed out to the buyer and therefore there could have been no question that delivery had taken place.

The view we take is that the Native Commissioner dealt with this case entirely under the Common Law and did not take cognizance of Section 147 of the Code.

The onus which was placed on the defendant was shifted to the plaintiff who will have to prove that he has good title to the property, or at least a better title than what the judgment debtor or the defendant had.

It is ordered that the appeal be and is hereby allowed with costs, and that the Native Commissioner's judgment be set aside. The case is remitted to the Native Commissioner's Court for such evidence as plaintiff might wish to adduce and rebutting evidence by defendant (if any). Thereafter a fresh judgment to be given.

For Appellant: Mr. S. H. Brien, instructed by J. Gerson, Esq., of Empangeni.

Respondent: In default.

Statutes, etc., referred to:—

Section 147 of Proclamation No. 168 of 1932.

Cases referred to:—

Mbulawa *v.* Fokseni, 1920 (N.H.C.) 32.

Nyongwana *v.* Xolo, 1912 (2) (N.H.C.) 46.

Case No. 27 of 1949.

NGADA CEBENKULU (Appellant) *v.* THOMAS NXUMALO (Respondent).

(N.A.C. Case No. 20/3/1949.)

Eshowe: Tuesday, 19th July, 1949. Before Steenkamp, President, Oftebro and Thompson, Members of the Court (North-Eastern Division).

Practice and Procedure—Recording of evidence—Costs.

Held: That this Court is not in a position, without evidence, to hold that the principles in another case can be applied to this case, which is between different parties.

Appeal from the Court of the Native Commissioner, Empangeni.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff sued the defendant in the Chief's Court for the release of five head of cattle which had been attached by the Chief's messenger to satisfy a judgment of the Chief's Court against one Matewu Ndaba in favour of the present defendant. The Chief gave judgment in favour of plaintiff for the release of five head of cattle and costs. An appeal was noted to the Native Commissioner's Court, where the appeal was dismissed with costs.

On the same day the Native Commissioner also heard a case between different parties but in which the judgment debtor was also Matewu.

In the present case no evidence whatsoever was adduced. A note appears on the record that the evidence is the same as in Case No. 8/49, which is the other case referred to.

An appeal has been noted to this Court against the whole of the judgment. No grounds of appeal are given, but these are not necessary as neither party was represented in the Court below.

When this appeal was prosecuted before this Court, both Counsel intimated that as no evidence was recorded, it is not possible for them to argue, and they both consent to the case being referred back to the Native Commissioner for the purpose of calling evidence.

This is the only possible action that can be taken, as it is not understood how the Native Commissioner could have used the facts in a case between different parties to apply to the present case. This Court is not in a position, without evidence, to hold that the principles in the other case can be applied in the present case. It would very much appear that the Native Commissioner has misdirected himself and was misled by the fact that the judgment debtor was the same in both cases.

This Court must insist that more attention should be paid to cases between Nativcs, and a short cut is not always practicable.

There is the question of the costs of appeal. Counsel for appellant has argued that his client should not be called upon to pay costs as it was the fault of the Native Commissioner in the case not being properly put before this Court.

On the other hand, Counsel for respondent has argued that appellant should pay costs of appeal. This Court, however, holds the view that in as much as the fault lies entirely with the Native Commissioner, the most equitable order would be that costs should be costs in the cause.

It is accordingly ordered that the appeal be and is hereby allowed. The Native Commissioner's judgment is set aside and the record returned to him for the purpose of hearing evidence. and delivering a fresh judgment. Costs in the Court below and costs of appeal to be costs in the cause.

For Appellant: Mr. S. H. Brien of Eshowe.

For Respondent: Adv. G. D. E. Davidson of Empangeni.

CASE No. 28 OF 1949.

MAQUDE MZIMELA (Appellant) *v.* GEZINKOMO GUMEDE AND ANOTHER.

(N.A.C. Case No. 7/1/49.)

ESHOWE: 19th July, 1949. Before J. H. Steenkamp, President, Oftebro and Thompson, Members of the Court (North-Eastern Division).

Practice and Procedure—Plea—Recording of—in Native Commissioners' Courts.

Evidence—Laxity in recording of.

Held: That in terms of Section 26 (*a*) of Government Notice No. 2253 of 1928, pleas must be filed or taken in cases in the Native Commissioner's Court.

Held: That the contents of registers referred to must be verified by the judicial officer and all evidence recorded in such a way that it can be followed.

Appeal from the Court of the Native Commissioner, Eshowe.

Steenkamp, President (delivering the judgment of the Court):—

Appellant sued the respondent before the Native Commissioner for the return of eleven head of cattle and costs.

Appellant had also joined the Chief as second defendant, and claimed £10, being damages for which judgment was granted for second respondent, and against which there is no appeal. Therefore, in so far as this claim for damages is concerned, it is not necessary to refer thereto again.

In his summons appellant alleges that respondent was engaged to his daughter and paid nine head of cattle and £12, but appellant had demanded another £10 as respondent had seduced and rendered pregnant the appellant's daughter.

Without an Order of Court the Respondent, through the Chief's Messenger and on instructions from the Chief, attached twenty head of cattle. Appellant further avers that as respondent was entitled to only nine head of cattle refund of lobolo, he is entitled to the return of the eleven head which should not have been attached.

In fact the appellant is entitled to the full twenty head of cattle which were illegally attached, but he has set off the nine head he admits owing.

The Native Commissioner who tried the case took no plea from the defendants, and his attention is invited to rule 26 (*a*) of the Native Commissioners' Court Rules.

From the reading of the evidence as recorded by the Native Commissioner it is apparent that this case was tried with considerable laxity and indifference. It is very difficult to follow the evidence, and after an appeal was noted the Native Commissioner made an attempt, in his reasons for judgment, to bolster up the case by including therein facts that were not adduced in evidence.

Judgment was granted for defendant with costs, and against this judgement an appeal has been noted. The notice of appeal reads as follows:—

> "Plaintiff appeals against the learned Native Commissioner's judgment on plaintiff's claim for 11 head of cattle illegally attached only, on the grounds that such judgment is against the weight of evidence."

Paragraphs 3 and 5 of the facts found proved by the Native Commissioner read as follows:—

> "3. Defendant No. 1 sued plaintiff and got judgment for return of lobolo paid by him.
>
> 5. That this case was duly recorded in Register of Chief's judgments."

Paragraph 3 is a distortion of the facts and the Native Commissioner in his reasons states:—

> "Defendants however allege, prove that the attachment was based on a properly tried and registered judgment, Case No. 124/48 and 233/48, and plaintiff makes no real effort to disprove this."

The Chief gave evidence on behalf of respondent and in the course of this evidence he states: "I duly registered the case at this Court—No. 124/48." No attempt was made to hand in the register of cases maintained at the office of the Native Commissioner, but Counsel for appellant has produced the register before this Court and the claim reads as follows:—

> "Plaintiff brought defendant before Chief in that defendant refused to give consent to plaintiffs marriage to denfendant's daughter."

The judgment reads:—

> "Defendant ordered to marry parties. Defendant to pay costs."

What this judgment has to do with refund of the cattle is beyond the comprehension of this Court, and all we can say is that the Native Commissioner could not have referred to the register, and he has misled this Court, a most grave dereliction of duty on the part of a judicial officer. This is not all. He refers in his reasons to Case No. 233/48 and conveys the impression that this case was in respect of the refund of twenty head of cattle, but as the register was available this Court took the opportunity of referring thereto, and what do we find but that the case was in respect of £22. 12s. 6d., and for which

respondent obtained judgment. There is not a word about cattle and how the Native Commissioner could have found Fact 5 proved is incomprehensible. In his reasons he goes on and states:—

> "It seemed to the Court that plaintiff's allegations of illegality was merely an attempt to circumvent the legitimate results of his failure to appeal or interplead in the proper manner, time and place."

The true facts are that respondent obtained a judgment for £22. 12s. 6d. and for this judgment debt, twenty head of cattle were attached. If ever an unlawful act was performed, this is an example of one. The Chief and respondent acted arbitrarily and the Chief is most fortunate that appellant did not appeal against that part of the judgment against him.

The most that could have been attached were four or five head of cattle.

Appellant, however, states that the judgment was for £13 and he paid this amount to the Chief's Messenger. He is not quite correct about the amount of the judgment, but the fact remains that if it is true that he paid £13, a balance of £9. 12s. 6d. remains.

Appellant has only claimed eleven head of cattle, and he is entitled to judgment for this, but he will be well advised to pay the judgment debt of £22. 12s. 6d. in full, which, according to his own evidence, stands at £9. 12s. 6d. balance.

There is another aspect on which this Court is constrained to pass strictures. The typing and preparation of the copies of the record leave much to be desired. They have obviously not been checked and some copies are without indexing.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

"For plaintiff for eleven head of cattle and costs."

For Appellant: Mr. S. H. Brien, of Eshowe.

Respondents: Both present in person.

Statutes, Proclamations, etc., referred to:—

Section 26 (*a*) of Government Notice No. 2253 of 1928.

CASE No. 29 OF 1949.

JABULANI MNGADI (Appellant) *v.* ZACHARIAH NGWANE (Respondent).

(N.A.C. Case No. 21/2/49.)

DURBAN: 25th July, 1949. Before Steenkamp, President, Martin and Ashton, Members of the Court (North-Eastern Division).

Law of Contracts—Sisa custom—Payment of herding fees.

Appeal from the Court of the Native Commissioner, Mapumulo.

Steenkamp, President (delivering the judgment of the Court).

Plaintiff (appellant in this Court) in his capacity as heir to his late brother Jonathan Mngadi, sued the defendant in the Chief's Court for nine head of cattle which were sisaed by the late Jonathan Mngadi to the defendant.

Defendant counterclaimed for the payment of £8 for having looked after the cattle. The Chief gave judgment in favour of plaintiff for 8 head of cattle and costs.

Defendant appealed to the Native Commissioner, where the only point in issue was whether defendant was entitled to the £8 which he alleged was for herding fees. The Native Commissioner, after hearing evidence, altered the Chief's judgment to read "For plaintiff for 8 head of cattle, subject to the payment of £8 to defendant by plaintiff. Plaintiff to pay costs."

This judgment really means that the defendant was successful in his counterclaim and it would have been much better if the Native Commissioner had divided his judgment into two sections, namely (1) claim in convention; and (2) claim in reconvention.

Plaintiff has now appealed to this Court. The notice of appeal is not drawn up too well and from the preamble one would gain the impression that he was also appealing against the award of 8 head of cattle, but when we look at the grounds of appeal, which are appended hereunder, it would appear that he is only appealing against the judgment on the counterclaim of £8.

The grounds of appeal are as follows:—

1. That the judgment was against the evidence and weight of evidence.
2. That the onus upon defendant was exceptionally heavy in as much as defendant's claim is (*a*) one against a deceased estate; (*b*) based on an alleged verbal agreement which is contrary to the accepted practice and custom of the Natives.
3. That the learned Native Commissioner erred in holding that the defendant had discharged this onus.
4. That by reason of the many inconsistencies and contradictions in the evidence adduced for defendant, the Native Commissioner erred in accepting such evidence as credible.

The Native Commissioner in his reasons has found proved that the late Jonathan Mngadi entered into an agreement to pay plaintiff £8 for herding the cattle sisaed to him. This finding is attacked in the grounds of appeal.

This Court realises and appreciates that a heavy onus rests on the defendant to prove an agreement made with a person who is now deceased. The onus was on the defendant, and after he had given evidence he called one witness, whereupon he closed his case. Plaintiff, without adducing any evidence, also closed his case. Defendant's evidence therefore stands uncontradicted. It is realised that plaintiff is in this position that he could not prove a negative, and it is necessary for this Court to consider the defendant's evidence very carefully.

It would appear that the late Jonathan Mngadi was a bachelor and he had to return to his employment at the Labour Centre. He had no one to look after his cattle and the defendant states he was not too eager to look after the cattle and told the late Jonathan that he could only do so if he was paid for the employment of an extra herd boy, as his own son was very small and could not manage to look after such a number of cattle alone. This evidence sounds reasonable and rings true, and defendant is supported by the witness Mtunusha, who states that the deceased Jonathan brought 5 head of cattle and that they spoke about these cattle in his presence and the deceased begged the defendant to take the cattle as he had to return to his employer, and he undertook to pay defendant £8 per year for looking after them. This witness states he knows the custom of sisa and he knows it is customary to pay for the herding of cattle which usually takes the form of a beast.

This witness is not quite correct when he states that it is the custom to pay for herding of cattle. What the custom really is, and this is what the witness probably meant, is that the owner of the cattle usually remunerates the person who looks after the cattle in the form of a beast. The last sentence of Section 150 (3) of the Code reads as follows:—

> "It is customary, however, for the owner of the cattle occasionally to donate a beast from the increase to the other party, but no claim at law can be made for this *without proof of a specific contract so to donate.*"

It is therefore clear that a specific contract can be made for remuneration.

In the case of Mkwanazi *v.* Ndhlela, 1942, N.A.C. (T. & N.) 45, the learned President Braadvedt remarked:—

> "It is also in our experience unknown for Natives who reside in reserves in Zululand, to charge herding fees for cattle sisaed with them",

but the present case must be distinguished from that case in that the present one is based on a specific contract, provision for which is made in Section 150 (3) of the Code.

The way we read he law there can be no doubt that herding fees cannot be claimed as of a right, but there can be no objection to a contract being entered into for the payment of such fees at the time the sisa contract is entered into.

Counsel for appellant has conceded that such a contract may be entered into.

It is observed that the notice of appeal is not based upon the question as to whether an agreement may or may not be entered into. It is based entirely on the question whether defendant has advanced sufficient proof of the alleged contract.

The Native Commissioner had the witnesses before him and he was in a position to judge whether they were speaking the truth or otherwise. Discrepancies can be expected in a case of this nature but these discrepancies are not such as to enable this Court to state definitely that defendant has not proved the agreement.

The appeal is dismissed with costs, but the Native Commissioner's judgment is altered to read as follows:—

> "The appeal from the Chief's Court is upheld with costs and the judgment altered to read:—
>
> (*a*) Claim in convention: For Plaintiff for 8 (eight) head of cattle with costs.
>
> (*b*) Claim in reconvention: For Defendant (i.e. Plaintiff-in-Reconvention) for £8 with costs."

For Appellant: Adv. F. P. Behrman, instructed by H. L. Bulcock, Esq., Ixopo.

For Respondent: Mr. N. R. F. Steven, Stanger.

Statutes, Proclamations, etc., referred to:—

Section 150 (3) of Proclamation No. 168 of 1932.

Cases distinguished:—

Mkwanazi *v.* Ndhlela, 1942, N.A.C. (T. & N.), 45

CASE No. 30 OF 1949.

LYDIA MARUDU (Appellant) *v.* SIDNEY LANGA (Respondent).

(N.A.C. Case No. 86/1/49.)

PRETORIA: Monday, 12th September, 1949. Before Steenkamp, President, Smithers and de Beer, Members of the Court (North-Eastern Division).

Damages—For seduction—Maintenance of child born as result of subsequent intercourse—Lying-in expenses.

Practice and Procedure—Noting down of system of law applicable in case.

Held: That if it is so obvious under what system of law the Native Commissioner is trying the case it hardly seems necessary that this should be indicated in clear language on the record.

Held: That maintenance of woman, whilst pregnant, is part of lying-in expenses, and will only be assessed for a reasonable period before the birth and a reasonable period after the birth for recuperation.

Held: That it is the prerogative of the guardian of an illegitimate child to sue for the maintenance of the child, and that in cases under Common Law between Native and Native the mother cannot become guardian of her illegitimate child unless there is statutory provision for her emancipation, e.g., Section 28 of the Natal Code of Native Law.

Appeal from the Court of the Native Commissioner, Bochem.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff, a Native female of full age, is claiming from the defendant damages as follows:—

(*a*) £50 for breach of contract of marriage;

(*b*) £25 for seduction;

(*c*) £180 maintenance for herself for two years at £7 per month;

(*d*) £32 maintenance for the child from date of birth;

(*e*) £2 a month maintenance for the child from 1st February, 1949;

(*f*) alternative relief;

(*g*) costs.

The Native Commissioner entered an absolution judgment from the instance with costs. Against this judgment an appeal has been noted to this Court on the grounds (i) that the judgment is against the weight of evidence in that the Native Commissioner erred in finding that there was not sufficient evidence *aliunde* to supplement plaintiff's testimony; (ii) that the judgment is bad in law in that the Native Commissioner erred in finding that there was not sufficient corroboration of plaintiff's testimony.

It was raised in argument that there is no indication on the record whether the Native Commissioner tried this case under Common Law or under Native Law and Custom as laid down in Yako's case, S.A.L.R. 1948 (1), page 401 (A.D.).

It is obvious from the summons and from the proceedings that the case was brought to Court under our Common Law, and although it is advisable for a Native Commissioner always to indicate on the record whether he is trying the case under Native Law and Custom or under Common Law, yet if it is so obvious under what system of law he is trying this case, it hardly seems necessary that this should be indicated in clear language.

At the outset it is desired to point out that Counsel for appellant has informed this Court that he is not pressing claim (*a*), i.e., for breach of contract of marriage, and therefore this aspect of the case will not be referred to again.

In so far as claim (*b*) is concerned, viz., £25 for damages for seduction, the plaintiff in her particulars of claims states that during 1944 the defendant seduced her. He did not make her pregnant and the Court has to decide whether the seduction, as alleged by her, actually took place during that year.

Counsel for respondent has raised, for the first time in this Court, the defence of prescription, but as this was not raised in the Court below, it is too late now to do so.

Defendant in his plea denies that he ever seduced the plaintiff, but is his evidence he admits he had connection with her during 1945 and 1946 on three occasions. He does not deny that when he first had connection with her, she was a virgin, and therefore in so far as the claim for damages for seduction is concerned, this has been satisfactorily proved by the plaintiff, coupled with the admission by the defendant.

She has waited a considerable time before instituting an action for damages for seduction but this is understandable in view of the fact that intimacy between the plaintiff and defendant continued, but for a break of about eight months, until the time that she became pregnant.

Her delay in bringing an action does not debar the claim, but at the same time this Court must, in assessing damages, take this into consideration.

There is, however, this aspect that her guardian did institute an action against the defendant during 1947, but that action was not commenced until it became apparent that she was pregnant and was about to give birth to the child.

The delay, in the opinion of this Court, certainly mitigates damages and we do not think that she is entitled to the full amount of £25 claimed.

Judged by European standards the conduct of the plaintiff was most reprehensible and unbecoming and she asks this Court to apply Common Law.

The plaintiff was a probationer nurse—first of all at the Bochem Hospital and later at Vereeniging. She is a person of some standing and the defendant, who is a medical aid at Bochem Hospital is also of some standing, but the plaintiff's morals after she was seduced, have not been exemplary, as she and the defendant continued being intimate and this, in the opinion of the Court, is sufficient for it to state that she is not entitled to high damages, and it is the considered opinion of this Court that an amount of £10 will meet the case.

The next claim is that of £180 for the maintenance of plaintiff herself for two years at £7 per month. This claim for maintenance is included in what is commonly known as " lying-in " expenses.

Here it must be observed that the maintenance she claims for herself does not flow from the seduction, but from the pregnancy which occurred a few years after she was first seduced.

Various authorities have been consulted, including the case of Botha *v.* Peach, 1939 W.L.D. 153, and Mguni *v.* Mtwali, 1923 T.P.D. 368, and Jacobs *v.* Lorenzi, 1942 C.P.D. 394, from which it is clear that " lying-in " expenses flow from pregnancy and maintenance as mentioned in Jacob's case is clearly recoverable as part of the " lying-in " expenses.

This question was also dealt with in the sister Court in the case of Ngquka *v.* Kula, 1946 N.A.C. (C.O.) 71, in which it was decided that maintenance may be included in " lying-in " expenses, but in that case there was not sufficient evidence to enable the Court to assess the damages and an absolution judgment was entered.

In the present case we have the evidence of the plaintiff in which she states that she had to relinquish her employment at the Vereeniging Hospital several months before she was confined and she has not been able to work for a considerable period after the confinement as she had to care for the child.

Defendant, however, in his evidence denies that he was responsible for the plaintiff's pregnancy and states that since April, 1946, when she left for Vereeniging, he has had no intercourse with her. She admits that she went to the Vereeniging Hospital in April, 1946, and during the rest of that year she did not see the defendant nor did they write to each other, but as soon as she returned to her home at Bochem at the beginning of 1947 on leave, the defendant came to see her and had intercourse with her on the 6th January and again on the 11th January, and it was as a result of these two intercourses that she became pregnant, and that after she returned to Vereeniging she was suspicious during the month of February that she was pregnant and consulted a doctor who confirmed her suspicions.

This Court has to decide whether there is sufficient evidence *aliunde* to corroborate the plaintiff's evidence.

There is attached to the record a letter written on the 21st May, 1947, by the defendant to the plaintiff's brother in which he states:—

> " Thank you very much for your letter. All I can say about this matter is that I cannot agree to a thing that I am not sure of. You see, people are sure that I am responsible just because Lydia says so, but you should not forget that she may be wrong too."

He goes on in his letter and states:—

> "I suggest that we wait and see the result and from that we may find out something as yet unknown, then we shall be sure."

It is noted that in this letter defendant does not deny that he had intercourse with the plaintiff, but what he does in fact seem to doubt is whether he was the person responsible for her pregnancy. It is accepted in law that once it is found that the defendant had intercourse with the woman, in the ordinary course her evidence must be accepted that he is responsible for her pregnancy. There is, therefore, sufficient evidence to decide that the defendant was responsible.

The Native Commissioner in his reasons for judgment states that if defendant had intercourse with the plaintiff on the 6th January as alleged by her, a fully developed child could not have been born on the 22nd September, 1947, which is the date of birth of the child.

This Court has consulted authorities on the question of the period of gestation. It will be observed that the period between the 6th January and the 22nd September, 1947, is 260 days, i.e., over 37 weeks. According to *Tayler's Medical Jurisprudence* on page 239, the average duration of gestation in the human female is comprised of between the 38th and 40th week after conception. The Native Commissioner has misdirected himself and this Court is satisfied that the defendant could have been the father of the child.

Reverting to the claim for maintenance for plaintiff herself, this Court is of opinion that her claim in this respect is far in excess of what she would be entitled to normally. In the case of Botha v. Peach, *supra*, it was held that under the heading of "lying-in" expenses, which include maintenance for the plaintiff herself, a claim under this head is covered by the claim for loss of salary. In that case the plaintiff was obliged to relinquish her employment sometime before the birth of the child and she cannot be expected to start work immediately after confinement. It is true the Court had the benefit of medical evidence, which is lacking in the present case, but in that case the underlying principle would appear to be that the Courts will only assess damages under this heading for a reasonable period before birth and a reasonable period after birth for recuperation, and *Ramsbottom, J.*, allowed the plaintiff to be recouped for three months' salary which she had lost as a result of her confinement.

In the present case plaintiff has given evidence that her salary as a nurse was £7 per month, but there is no evidence as to the period it took her to recuperate after the confinement, but the point is not so insuperable that this Court cannot use its own judgment as to the period she should be recouped in lieu of the salary she lost. We are, however, of opinion that the allowance in lieu of salary for three months is reasonable and the amount of £21 under the heading of "lying-in" expenses should be allowed.

We now come to the claim for maintenance for the child. At the outset we wish to state that it is an inherent conception in Native life in the Union of South Africa that the guardian of an illegitimate child is not the mother, but her father. Even if a Native girl sues for damages for seduction in her own name, it does not follow that she can always, in her own name, sue for the maintenance of the child. That is the prerogative of the guardian of the illegitimate child. The guardian is the one entitled to the "property rights" as it is termed in Native Law and Custom, in the child.

From the case of Carelse *v.* de Vries's Estate, 1906—23 S.C. 532, it is clear that when a mother, under the Common Law of South Africa, sues for the maintenance of an elegitimate child, she does so in her capacity as mother and guardian.

Maasdorp, Vol. IV, 5th Edition, page 142, states:—

> "An action for maintenance of the child, at any rate, which is a right rather of the illegitimate child than of the mother, will not be lost by the death of the father."

From this it is apparent that it is in fact the child who sues his natural father for the maintenance, but being of tender years his mother, who is the guardian, sues.

We therefore hold the view that when we deal with cases under Common Law between Native and Native, the mother cannot become the guardian of her illegitimate child unless there is statutory provision for her emancipation, similar to that provided under Section 28 of the Natal Native Code.

This Court has consulted the case of *in re* Estate of the late Annie Mzehkazi, 1933 N.A.C. (T. & N.) 28, in which *Howard Rogers, A.P.*, is reported to have stated on page 30:—

> "If by virtue of her immoral conduct or for any other cause a Native spinster has been expelled from and repudiated by the kraal to which she belonged, her connection with that kraal would be entirely severed and such severance would extend to rights of succession. This Court is of opinion that in such a case the deceased spinster should, for succession purposes, be regarded as having herself been a kraal head."

If this is correct Native Law it would appear that a Native spinster may become emancipated under certain circumstances and if she should bear any illegitimate children while so emancipated, she is then guardian and may in her own name sue for maintenance of the children.

These special circumstances are not present in the case now before this Court, and that being so, only the guardian of the child, i.e., his maternal grandfather or successor, can sue the natural father for maintenance.

The claim for maintenance of the child cannot be entertained. We are not dealing with the question whether the guardian who has property rights in the child according to Native Law and Custom, is or is not entitled to the receipt of maintenance. That can only be decided in a case properly brought before the Courts. The appeal is allowed in part with costs, and the Native Commissioner's judgment is altered to read as follows:—

"(*a*) Breach of promise: Absolution from the instance.

(*b*) Seduction: For plaintiff for £10.

(*c*) Lying-in expenses: For Plaintiff for £21.

(*d*) and (*e*) Maintenance of child: Claim dismissed.

(*f*) Defendant to pay costs.

For Appellant: Adv. G. Viljoen, instructed by Messrs. Chaitow & Hirschmann, Pietersburg.

For Respondent: Mr. A. W. Jones, instructed by Messrs. Slabbert & Buchner, Pietersburg.

Cases referred to:—

Yako's case—S.A.L.R. 1948 (1)—401 (A.D.).

Botha *v.* Peach, 1939 W.L.D. 153.

Mguni *v.* Mtwali, 1923 T.P.D. 368.

Jacobs *v.* Lorenzi, 1942 C.P.D. 394.

Ngquka *v.* Kula, 1946 N.A.C. (C.O.) 71.

Estate late Annie Mzehkazi, 1933 N.A.C. (T. & N.) 28.

Carelse *v.* de Vries's Estate, 1906—23 S.C. 532.

CASE No. 31 OF 1949.

WILFRED DICHABE (Appellant) *v.* MITA DICHABE (Respondent).

(N.A.C. Case No. 60/2/49.)

PRETORIA: Tuesday, 13th September, 1949, Before Steenkamp, President, Smithers and de Beer, Members of the Court (North Eastern Division).

Practice and Procedure—Appeals from Native Chief's Court in criminal matters.

Held: that the Native Commissioner has misdirected himself in treating the case as a civil appeal, whereas from the Chief's reasons for judgment it is clear that he dealt with the matter as a criminal case.

Held: that the fact remains that the Native Commissioner has treated this case as a civil one. He was obviously wrong, and in this case, having been dealt with as such, the appellant had no other remedy but to appeal to this Court.

Appeal from the Court of the Native Commissioner, Hammanskraal.

Steenkamp, President—delivering the judgment of the Court:—

From the proceedings in this case it would appear that appellant's wife lodged a complaint with the Chief to the effect that her husband had driven her and the children away from his kraal.

The Chief enquired into the matter and fined the appellant one beast. This beast was duly attached. The appellant then appealed to the Native Commissioner against the finding and the penalty. The Native Commissioner treated the case as being a civil appeal between appellant and his wife, who is being cited as the respondent.

The Native Commissioner has misdirected himself in treating the case as a civil appeal, whereas from the Chief's reasons for judgment it is clear that he dealt with the matter as a criminal case, because in the last paragraph of his reasons the Chief states that to drive away the wife and children and furniture is, under Native Law and Custom, an offence, and the penalty is one beast.

The Native Commissioner's attention is invited to Section 20 of the Native Administration Act under which power is given to the Minister to confer upon any Native Chief or Headman jurisdiction to try and punish what is punishable under Native Law and Custom, any Native who has committed . . . any offence specified by the Governor-General which is punishable under Native Law and Custom. Rules under this Section are prescribed by Government Notice No. 1099, dated the 18th June, 1943, and this case should have been treated as a criminal case.

The Native Commissioner has not followed the proper procedure as laid down in the case of Zwane *v.* Sitoli, 1947, N.A.C. (T. & N.) 30. The reports of that case were released during April 1948, and this Court would expect that the Native Commissioner would, by this time, have made himself conversant with the decisions of this Court.

The fact remains that the Native Commissioner has treated this case as a civil one. He was obviously wrong, and the case, having been dealt with as such, the appellant had no other remedy but to appeal to this Court.

The proceedings in the Native Commissioner's Court are set aside, and the Native Commissioner would be well advised to hear the case as a criminal appeal from the Chief's Court.

For Appellant: Mr. G. Aitchison of Aitchison & Versfeld, Pretoria.

For Respondent: in default.

Statutes, etc., referred to:—

Section 20: Act No. 38 of 1927. Government Notice No. 1099 dated 18th June, 1943.

Cases referred to:—

Zwane *v.* Sitoli, 1947 N.A.C. (T. & N.) 30.

CASE No. 32 OF 1949.

SHIZWI BHENGU (Plaintiff) *v.* ZICITILE BHENGU (Defendant).

(N.D.C. Case No. 38/3/1948.)

PIETERMARITZBURGH: 20th April, 1949. Before Steenkamp, President.

Husband and wife—Divorce—Claim for forfeiture of the benefits refused.

Held: That where Natives are married with community of property excluded in terms of Section 22 (6) of Act No. 38 of 1927, there are no benefits to be excluded.

NATIVE DIVORCE COURT

(North-Eastern Division)

Pietermaritzburg.

In the matter of SHIZWI BHENGU, Plaintiff, and ZICITILE BHENGU (born NDEBELE), Defendant.

JUDGMENT.

The plaintiff sued the defendant, his wife, for divorce on the grounds of adultery, and in his prayer he included a clause for the forfeiture of benefits arising from the marriage.

In giving judgment the Court granted a decree of divorce but did not order that the benefits arising from the marriage are forfeited.

This was deliberately done for the reason that, according to the marriage certificate, community of property was excluded in terms of Section 22 (6) of Act No. 38 of 1927.

According to this Section, contrary to our common law, a marriage between Natives shall not produce the legal consequence of marriage in community of property between the spouses, unless the parties shall within one month previous to the celebration of such marriage declare jointly that it is their intention and desire that community of property and of profit and loss shall result from their marriage.

The way I read this Section, it means that a Native man and woman's marriage may be as follows:—

(*a*) By antenuptial contract as known in Roman-Dutch Law; or

(*b*) in community of property after a declaration; or

(*c*) community is automatically excluded unless a declaration is made.

In the case of Molefe *v.* Molefe, 1946 A.D. 315, an interpretation was given as to the meaning of Section 22 (6) of Act No. 38 of 1927, in so far as it affects a marriage under (*c*), and the way I read the judgment, it means that whatever property either spouse owned at the time of the marriage, or acquired during the subsistence of the marriage, belongs to him or her, with this proviso that the husband has the marital power over the property.

Such a marriage does not mean that the husband has bestowed any proprietary right on the wife as this can only be done by an antenuptial contract properly entered into prior to the marriage. In other words, she does not receive any benefits from the husband and it is only logical to conclude that if no benefits are received, there can be no forfeiture of the benefits.

After the Court had failed to make an order declaring forfeiture of benefits, application was made to amend the judgment which was refused, and a written judgment filed which it is desired should be read with these reasons.

For Plaintiff: Adv. J. D. Stalker, Pietermaritzburg.

For Defendant: Adv. J. H. Niehaus, Pietermaritzburg.

Statutes, etc., referred to:—

Section 22 (6) of Act No. 38 of 1927.

Cases referred to:—

Molefe *v.* Molefe, 1946, A.D. 315.

NOTE.—This decision has, on appeal, been reversed by the N.P.D. on 19th July, 1949.

CASE No. 33 OF 1949.

SOLOMON GWAMBE (Plaintiff) *v.* FANNY GWAMBE (Defendant).

(N.D.C. Case No. 72/2/49.)

PRETORIA: 30th August, 1949. Before Steenkamp, President.

Husband and wife—Divorce—Jurisdiction—domicile—Portuguese East African Native.

Held: That, where a Native was born in Portuguese East Africa and came to the Transvaal in 1920; now regards South Africa as his permanent home and has no intention to return, but still pays Portuguese taxes because of an agreement between the Portuguese and Union Authorities, and is in possession of a valid passport from the Portuguese Territory, this Court has no jurisdiction to try a divorce court action in which he is a party, as he is not domiciled in the Union.

NATIVE DIVORCE COURT

(North-Eastern Division),

P.O. Box 384,

Pretoria.

30th August, 1949.

Case No. N.D.C. 72/2/49.

SOLOMON GWAMBE (Plaintiff) represented by Adv. Trengrove v. FANNIE GWAMBE (born Mihla) (Defendant) in default.

Before: J. H. Steenkamp, Esq., President.

JUDGMENT.

Plaintiff sues his wife, the defendant, for divorce on the ground of adultery. The defendant is in default, and plaintiff has adduced sufficient evidence for an order to be granted, provided this Court has jurisdiction.

Section 10 (1) of Act No. 9 of 1929, as amended by Act No. 56 of 1949, confers jurisdiction on Native Divorce Courts to hear and determine suits of nullity, divorce and separation between Natives domiciled within their respective areas of jurisdiction in respect of marriages, and to decide any question arising therefrom.

Sub-section (2) makes provision for the area of jurisdiction which shall coincide with that of a Native Appeal Court established under Section 13 of Act No. 38 of 1927.

Proclamation No. 85 of 1948 describes the area of jurisdiction of the Native Divorce Court, and this area for the purpose of appeals, falls within the jurisdiction of the Supreme Court, Transvaal Provincial Division and the Natal Provincial Division. It therefore follows that this Court, where there are conflicting decisions of the various Divisions, must—in Transvaal cases—follow the decisions of the first-named Court, and in Natal, the decisions of that Court.

On the question of domicile of the Plaintiff, the following are the facts:—

(1) Plaintiff was born in Portuguese East Africa.
(2) During 1920 he came to the Transvaal as a Minister of Religion and was stationed at various centres, the last and present place of abode being Middelburg.
(3) He regards the Union of South Africa as his permanent home, and his intention, if nobody interferes with him, is to reside in the Union for the rest of his life.
(4) He still pays Portuguese taxes because of an agreement between the Portuguese and Union authorities.
(5) Plaintiff is in possession of a valid passport from the Portuguese Territory.

Here we have a case in which a citizen of a foreign state avers that his domicile is in the Union of South Africa and this Court has to decide whether he may legally acquire such a domicile.

A similar case came before this Court in 1937 [Comcom *v.* Comcom, 1937 N.A.C. (T. & N.) 209]. Various authorities were consulted and the Court came to the conclusion that it had no jurisdiction. The point was again raised in the case of Moya *v.* Moya,, 1947 N.A.C. (T. & N.) 59, but the summons was dismissed for want of jurisdiction.

There can be no doubt that during the last decade, owing to war-time conditions, and conditions brought about as a result of the last war, intricate questions affecting domicile have been brought about, and the cases quoted by Mr. Trengove, Counsel for plaintiff, are in respect of soldiers, sailors and refugees. Counsel has admitted that he has not found direct authorities in the Provincial Divisions of the Supreme Court. He has quoted various cases, the latest being that of Nicol *v.* Nicol, 1948 (2) S.A.L.R. 613, which was decided in the Cape Provincial Division of the Supreme Court.

There are, however, other cases not quoted by Counsel, decided during the last few years, and this Court has consulted the following:—

McMillan *v.* McMillan, 1943 T.P.D. 345.

Ex parte Glass et Uxor, 1948 (4) S.A.L.R. 379 (W.L.D.).

In Glass's case, *Neser, J.*, distinguished it from that of McMillan case without differing from the dostrines laid down.

In McMillan's case, *Murray, J.*, would appear to have accepted that so long as the plaintiff is not a free agent, he may not acquire a domicile of his own free will.

The case of Neaves *v.* Neaves, 1936 N.P.D. 685, was quoted on page 352. This case was also relied on in Comcom's case (*supra*).

In the present case the plaintiff is not subject to payment of Hut Tax (subsequently substituted by Native General Tax). It is here necessary to quote Articles XVI and XX of the Convention between the Government of the Union of South Africa and the Government of the Portuguuese Republic, published under Government Notice No. 1597, dated 17th September, 1928:—

> Article XVI.—Portuguese Natives in the employment of the Mines, whether they entered the Union with a passport or whether they obtained one from the Curator legalizing their position shall upon the termination of their services on the Mines be regarded as prohibited immigrants in the Union,

and in this respect the provisions of the Immigrants Regulation Laws of the Union shall be applied, and any Portuguese Native, identified as such, who is not in possession of a valid and current Portuguese passport in addition to such permission of the Union Authorities as may be required shall also be regarded as a prohibited immigrant. Provided, however, that in order to meet special cases and also to ensure that the repatriation of Natives engaged before the commencement of this Convention shall not exceed the volume necessitated by Article III, it shall be competent for the Curator with the agreement of the Union Department of Native Affairs to postpone the requirements of this Article in specified cases.

Article XX.—No Portuguese Native holding a Portuguese passport issued in accordance with this Convention shall be liable to pay the Hut Tax applicable to the Natives of the Union.

It is clear from Article XVI that plaintiff is a prohibited immigrant and remains as such until he is freed by the Portuguese Authorities to carry out the *animus manendi* to establish his domicile in the Transvaal Province.

In Nicol's case (*supra*), *Ogilvie Thompson, A.J.*, admits on page 616 that it is difficult to reconcile the conflicting judicial views and decisions on the point, which latter must, it seems of necessity, remain controversial, until authoritatively determined by the Appellate Division. The Honourable Judge also, in quoting the words of *Murray, J.*, in McMillan's case (quoted on page 618) and the remarks of Lord Keith in Sellars *v.* Sellars (1942 S.C. 208-209) states:—

"With the greatest respect, this view appear to me to go unduly far."

From this remark I gather that *Ogilvie Thompson, A.J.*, does not agree with the conclusions arrived at in McMillan's case. This Court must be guided by the decision in McMillan's case, and as remarked before, the plaintiff—not being a free agent—cannot acquire a domicile of his own free will.

During argument this Court raised the question as to whether a person who is prevented by a Convention from paying tribute to a State, may acquire domicile in that State. Although the argument was advanced that he may do so, this Court holds the view that this is one of the factors which prevents a person from acquiring domicile. He is not a free agent, and until such time as he is released by his country of origin from paying tribute to that State, he may not acquire domicile in another State.

Let this be as it may—I hold the view that until such time as the doctrines—decided in the case of Neaves *v.* Neaves (*supra*) Natal, and in which Province this Court has jurisdiction, and in the case of McMillan's (*supra*)—are reversed, this Court, on the principle of the *stare decises* rule, must follow those decisions.

The plaintiff's case is dismissed for lack of jurisdiction.

For Plaintiff: Adv. J. J. Trengove (instructed by Messrs. Roux & Jacobsz, Pretoria).

Defendant: In default.

Statutes, etc., referred to:—

Section 10 (1) of Act No. 9 of 1929 as amended by Act No. 56 of 1949.

Proclamation No. 85 of 1948.

Government Notice No. 1597, dated 17th September, 1928.

Cases referred to:—

Comcom *v.* Comcom, 1937 N.A.C. (T. & N.) 209.

Moya *v.* Moya, 1947 N.A.C. (T. & N.) 59.

Nicol *v.* Nicol, 1948 (2) S.A.L.J. 613.

McMillan *v.* McMillan, 1943 T.P.D. 345.

Neaves *v.* Neaves, 1936 N.P.D. 685.